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NO._____

IN THE
Supreme Court Of The United States
OCTOBER TERM 1992

ROY B. ROBINSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

Whether the final judgment on the merits in an action for declaratory and related coercive relief is res judicata of a compulsory counterclaim that the defendant failed to assert in that action.

LIST OF ALL PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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NO._____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1992

ROY B. ROBINSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is unreported. The district court gave no opinion separate from its judgment, which is likewise unreported (App. 3a). Neither did the district court in the earlier related declaratory judgment action, but it did make findings and conclusions (App. 8a) ancillary to its judgment (App. 7a).

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on April 8, 1993 (App. 2a). A timely petition for rehearing was denied on May 3, 1993 (App. 23a). This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves 28 U.S.C. §§ 2201 and 2202, 33 U.S.C. §§ 403, 407, 1311(a), 1319(b), 1344(s)(3), 1344(s)(5) and 33 CFR 323.2. It also involves Rules 12(b), 13(a), and 16(e) of the Federal Rules of Civil Procedure. These authorities appear verbatim in the appendix, beginning at App. 25a.

STATEMENT OF THE CASE

In 1977 under 33 U.S.C. §§ 403 and 1311 the United States Army Corps of Engineers issued Roy Robinson a permit to dredge a boat slip on wetlands he owned riparian to Dickinson Bayou in Galveston County, Texas (89 R. 127; 84 R. 85, 100, 167 and unnumbered record page between 10 and 11).* In 1978 a dispute came up about whether Robinson had violated that permit by dredging a slip outside the bounds of the permit (84. R. 77-79, 167). To resolve the protracted dispute Robinson sued the government in 1984 in the federal district court in Galveston (Civil Action G-84-35) for a declaratory judgment that he hadn't violated the 1977 permit and for a mandatory injunction directing the Corps to grant him another permit to maintenance dredge the channel leading up to the disputed slip and to dispose the dredge spoil in navigable waters (84 R. 6, 11, 182, 187). Although the government filed no answer or counterclaim, it did file a motion under Rule 12(b) of the Federal Rules of Civil Procedure, requesting dismissal of the case for lack of jurisdiction of the subject matter and for failure to exhaust administrative remedies, all couched in the alternative as a

---

*"84 R" refers to the record in Robinson's declaratory judgment action filed in 1984, and "89 R" refers to the government's injunction suit (*this* case) filed in 1989.

motion for summary judgment (84 R 229-234). The district court expressly rejected the Rule 12(b) grounds alleged for dismissal and overruled the government's motion for summary judgment (84 R 196-199).

In 1986 after trial on the merits under a joint pretrial order signed by the attorneys for both parties (84 R 229-234) the district court rendered judgment that Robinson had violated the permit and so dismissed his suit (84 G. 255, 256). According to the supporting findings and conclusions the violation was that Robinson had dredged a slip in an area not included in the permit (84 R. 256, 257).

In 1989 the government filed the present action (G-89-298) in the same federal district court under 33 U.S.C. § 1344(s)(3) and (5), authorizing suit for violation of a dredging permit, and 33 U.S.C. § 1319(b), authorizing suit for violation of a spoil discharge permit (84 R. 1). Besides those pleaded statutes the district court also had original jurisdiction over this action under 28 U.S.C. § 1345 and 33 U.S.C. §§ 403, 406 and 1311(a). The complaint prays that Robinson be prohibitively enjoined from any further dredging and mandatorily enjoined to restore the illegally dredged wetland area and that he be fined $10,000 for each day of violation (89 R. 12). The averred basis for this relief was the 1986 judgment in the earlier suit (89 R 8, 9).

Robinson's answer included the affirmative defense that same 1986 judgment barred the government from bringing the present action, because that earlier judgment was res judicata of the government claims (89 R 10-21). The basis alleged for this proposition was that the government's causes of action to enjoin the dredging and impose a fine were compulsory counterclaims in the first suit under Rule 13(a) of the Federal Rules of Civil Procedure, because they were based on the same occurrence as the

claims that Robinson asserted in that first suit. Consequently, Robinson contended that the government was required to assert those enforcement claims, if ever, in that earlier declaratory judgment action (89 R. 20).

Nevertheless the district court rendered judgment in this second suit mandatorily enjoining Robinson to restore the wetland area he had improperly dredged (App. 3a). In a very short opinion without elaboration the court of appeals affirmed the district court's judgment (App. 1a).

REASONS FOR GRANTING THE WRIT

This case presents an important question never determined by the Supreme Court about a diametric conflict between the federal declaratory judgment statutes (28 U.S.C. §§ 2201 and 2202) and Rule 13(a) of the Federal Rules of Civil Procedure. The question is whether a final judgment in an action for declaratory relief based on 28 U.S.C. § 2201 and related coercive relief not based on 28 U.S.C. § 2201 is res judicata of a Rule 13(a) compulsory counterclaim, which the defendant failed to assert in the declaratory judgment action.

This is a little case but a big question. In a simple fact situation it gives the Court a chance to resolve a clear conflict between a federal statute and a federal rule, which will probably come up hereafter in all kinds of different cases. There is no conflict between the *decisions* of different circuits, because the Fifth Circuit's decision here seems to be the first to decide the issue. However, there is certainly a conflict in *principal* between the opinion of the district court in *Horn &. Hardart Co. v. Nat'l. R.R. Passenger Corp.*, 69 F. Supp. 1258 (D.D.C. Cir. 1987) and the Fifth Circuit's decision in this case.

Unfortunately, neither the court of appeals nor the district court wrote an opinion that went into the merits of this question. Nevertheless, the petitioner Robinson has consistently maintained both in the district court as well as the court of appeals that the 1986 judgment of the district court in Roy B. Robinson v. United States of America (G-84-255) operates as res judicata to preclude the government from obtaining an injunction in the present action, which was not filed until 1989 (G-89-298). The rejection of that contention by both of the lower courts was serious error, which has obviously affected the outcome of the litigation so far.

"For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases . . . [T]he principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action." *Dillard v. Security Pacific Brokers, Inc.*, 835 F.2d 607, 608 (5th Cir. 1988). These basic criteria are probably accepted in all courts.

The present case clearly meets the first three of the four tests just recited. But what about the fourth test? Was the same cause of action involved in both Robinson's 1984 declaratory judgment suit (G-84-35) and the government's 1989 injunction suit (G-89-298)? G-84-35 was Robinson's suit for a judgment (1) declaring that he hadn't violated his 1977 dredging permit by digging an unauthorized slip without authorization of the Corps and (2) mandating the Corps to grant him a permit to maintenance dredge the channel to that slip and dispose of the dredging spoil (84 R. 187, 182). The government filed no counterclaim in that action, in which after trial on the merits the district court

rendered judgment that Robinson had violated the permit and accordingly dismissed the case (A 7a). The government filed the present action (G-89-298) to prohibitively enjoin Robinson from further dredging the slip and channel and to mandatorily enjoin him to restore the slip to its original state (R. 12). The government's claim asserted in this case is obviously not the same as Robinson's claim in the first case, which the G-84-35 judgment expressly adjudicated. So why should the G-84-35 judgment be res judicata of the G-89-298 claim for an injunction? Because Rule 13(a) of the Federal Rules of Civil Procedure extends the scope of res judicata to preclude litigation in a second suit not only of matters that were expressly raised and adjudicated in the first suit between the same parties, but also matters that *should* have been raised and adjudicated in the first suit.

"A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been* railed in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (emphasis supplied).

In pertinent part Rule 13(a) of the Federal Rules of Civil Procedure provides:

> "(a) **Compulsory Counterclaims.** A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of

> third parties of whom the court cannot acquire jurisdiction." (emphasis supplied).

While the rule doesn't expressly say so, the legal consequence of the government's failure to assert a compulsory counterclaim in the first suit is that the unasserted counterclaim is merged into the judgment in the first suit, so that first judgment is res judicata that the government's unasserted compulsory counterclaim has been denied. *Dillard v. Security Pacific Brokers, Inc.*, 835 F.2d 607, 608 (5th Cir. 1988); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076 (5th Cir. 1984). See also Advisory Committee Note 7 to Rule 13a, citing *American Mills Co. v. American Surety Co.*, 260 U.S. 360.

The government's causes of action for an injunction and fine were compulsory counterclaims in G-84-35, because they arose out of the same occurrence as the plaintiff Robinson's claims for a declaratory judgment that he hadn't violated his dredging permit and for a mandatory injunction ordering the Corps to issue him a maintenance dredging permit. Therefore, even though those compulsory counterclaims weren't asserted in G-84-35, they're barred by res judicata and Rule 13(a) from being asserted in this later action. Consequently, Rule 13(a) required the district court to dismiss the government's complaint in this case.

But this dismissal mandate of the federal rule runs head on into 28 U.S.C. § 2202, which says:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any

> adverse party whose rights have been determined by such judgment."

Under that statute any party to a declaratory judgment may bring a subsequent action (or at least a subsequent motion in the same action) for any appropriate relief warranted by the declaratory judgment. That includes claims that the defendant could have asserted, but didn't, in the declaratory judgment action itself. So which controls? The federal rule, which says the government can't bring this second suit for an injunction or the federal statute, which says it can.

According to one circuit the above statute authorizes the defendant in a suit for declaratory judgment *only* to prosecute in a later suit a claim based on the declaratory judgment, which in the absence of that statute would be buried under the judgment by res judicata. *Horn &. Hardart Co. v. National R.R. Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988). However, if in addition to a declaration of rights the complaint in the first action requests "coercive relief," then *the Horn* court of appeals acknowledged without considering or deciding that the judgment in the first case might be res judicata of any counterclaim arising out of the same transaction as the principal claim involved in the first suit, which the defendant failed to assert in that earlier action. *Horn &. Hardart Co. v. National R.R. Passenger Corp.*, 843 F.2d 546, 549 (D.C. 1988). The opinion of the *Horn* district court was stronger, reasoning that res judicata would bar such a counterclaim unless the defendant succeeded in obtaining dismissal of the first case by a Rule 12(b) motion. *Horn &. Hardart Co. v. Nat'l. R.R. Passenger Corp.*, 659 F. Supp. 1258, 1265 (D.D.C, 1987).

In this connection, comment d of section 33 of the Restatement (Second) of Judgments (1982) says:

> "Pleaders sometimes interpolate declaratory prayers redundantly in standard actions, but this should not produce differences in the res judicata consequences of those actions. Thus a pleader demanding money damages may also ask for a corresponding declaration. For res judicata purposes the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of merger, bar, and issue preclusion. The same applies to a prayer for a declaration which would be the substantial equivalent of a judgment of rescission or reformation. So also an action to adjudicate interests in property, such as an action to quiet title, or to establish a status such as divorce, may be cast in declaratory form. This should not alter the res judicata effects of the judgments."

The holding in *Horn* was that Rule 13(a) and res judicata didn't apply to the facts of that particular case, because the defendant in the first *Horn* case never filed an answer or other pleading but instead only filed a Rule

12(b)(6) motion to dismiss for failure to state a claim, which was granted. Both *Horn* courts held that such a motion is not a "pleading," that Rule 13(a) requirements for compulsory counterclaims apply only to pleadings, and therefore that Rule 13(a) didn't apply. By contrast the district court in the first Robinson case rejected the government's Rule 12(b) motion to dismiss (84 R 196-199) following which the case was tried and adjudicated on the merits under a joint pretrial order signed by the attorney for the government as well as the attorney for Robinson. (84 R 229-234; 84 G 255, 256).

Under Rule 16(e) of the Federal Rules of Civil Procedure the pretrial order "shall control the subsequent course of the action." A pretrial order is a pleading. *Syrie v. Knoll International* 748 F.2d 304 (5th Cir. 1984); *In-Sink-Erator Mfg. Co. v. Waste King Corp,* 346 F.2d, 248, 251 (7th Cir. 1965), cert. denied 382 U.S. 835.

Therefore, while the *Horn* decisions don't apply, but the rationale in the *Horn* district court opinion does. So also does Rule 13(a). It's apparent from the latter opinion that when a suit for declaratory judgment is combined with a claim for coercive relief, then the ordinary rules of res judicata and compulsory counterclaim apply, and 28 U.S.C. § 2202 don't apply. That 1987 opinion also noted that the Horn action "seems the first federal case to confront directly the issue." *Horn &. Hardart Co. v. Nat'l. R.R. Passenger Corp.*, 659 F. Supp. 1258, 1265 (D.D.C, 1987). However, the *Horn* courts didn't need to decide the issue, because the first *Horn* action for declaratory and coercive relief was dismissed under Rule 12(b)(6) for failure to state a claim.

In the first action brought by Robinson, he not only requested a declaratory judgment that he hadn't violated the dredging permit, but he also asked that the Corps be ordered

to issue him a maintenance dredging permit. The latter is a request for coercive relief.. That being so, the ordinary rules of res judicata and compulsory counterclaim should apply to that suit for declaratory judgment. Since Robinson asked for coercive relief in the first suit, the government's claim for an injunction against Robinson was a compulsory counterclaim in the first suit. Because it wasn't asserted in that action, it's barred by res judicata from assertion in this action. If that's not the law, then it should be; and this is the Court and this is the time to make it the law. The buck stops here.

CONCLUSION

For the reasons given, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. COURT OF APPEALS
FILED
APR 08 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7360

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY B. ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-G-89-298)

Before REYNALDO G. GARZA, WILLIAMS, and JONES, Circuit Judges.[1]

PER CURIAM:

Having carefully studied the briefs and contentions of the parties in light of applicable law, the court finds no reversible error of fact or law in this case. The judgment of the district court is accordingly affirmed. See Fifth Circuit Local Rule 47.6.

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 12 1992
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF	§	
AMERICA	§	
VS.	§	CIVIL NO. G-89-298
ROY B. ROBINSON	§	

ORDER

Before the Court is the application filed by the United States of America seeking injunctive relief against Roy B. Robinson, Defendant. The Court, having considered the application is of the opinion that it should be, and it is hereby, **GRANTED**.

The Court finds that Defendant has destroyed wetlands as a result of unauthorized dredging activity on and adjacent to property owned by him in Galveston County, more particularly described as Lots 1A, 2 and 2A in Block 87 of the San Leon Farm Home Tracts. The area destroyed by Defendant is particularly illustrated as the "barge slip" on the drawing attached hereto as Exhibit A, incorporated by reference herein.

The Court further finds that an injunction should issue to permanently enjoin Defendant from any further work or discharge in the navigable waters and the wetlands of the United States located at and adjacent to his property, and further to direct Defendant to restore the wetland area illegally dredged and filled to its original condition.

It is, therefore, the **ORDER** of this Court that Defendant be, and he is hereby, **PERMANENTLY ENJOINED** from any further work or discharge in the navigable waters or wetlands of the United States located at or adjacent to his property as hereinabove described.

It is further **ORDERED** that Defendant be, and he is hereby, **DIRECTED TO RESTORE** the wetland area found by this Court to be illegally dredged and filled, to its original condition and elevation.

It is further **ORDERED** that the fill material to be used by Defendant to restore the area to its original elevations shall consist of clean loam material, as that term is recognized in the industry to mean a loose soil of mixed sand, clay, and silt, free from any debris or contaminants of any kind.

It is further **ORDERED** that Defendant shall deposit a sufficient amount of fill material to restore the area to the same sloping level as that of the adjacent wetland from the shoreline to the end of the dredged area, which is approximately 275 feet from the north end of the dredged area.

It is further **ORDERED** that after the area has been filled, Defendant shall plant the entire filled area with Spartina Alterniflora, commonly known as smooth cordgrass, in a gridlock pattern at intervals of three feet.

It is further **ORDERED** that Defendant shall continue to replant the area each year during the month of April until at least seventy percent of the restored area is covered with live Spartina Alterniflora.

It is further **ORDERED** that Defendant shall permit a representative from the United States Army Corps of Engineers to be present at any and all times during the performance of the restoration for the sole purpose of observation.

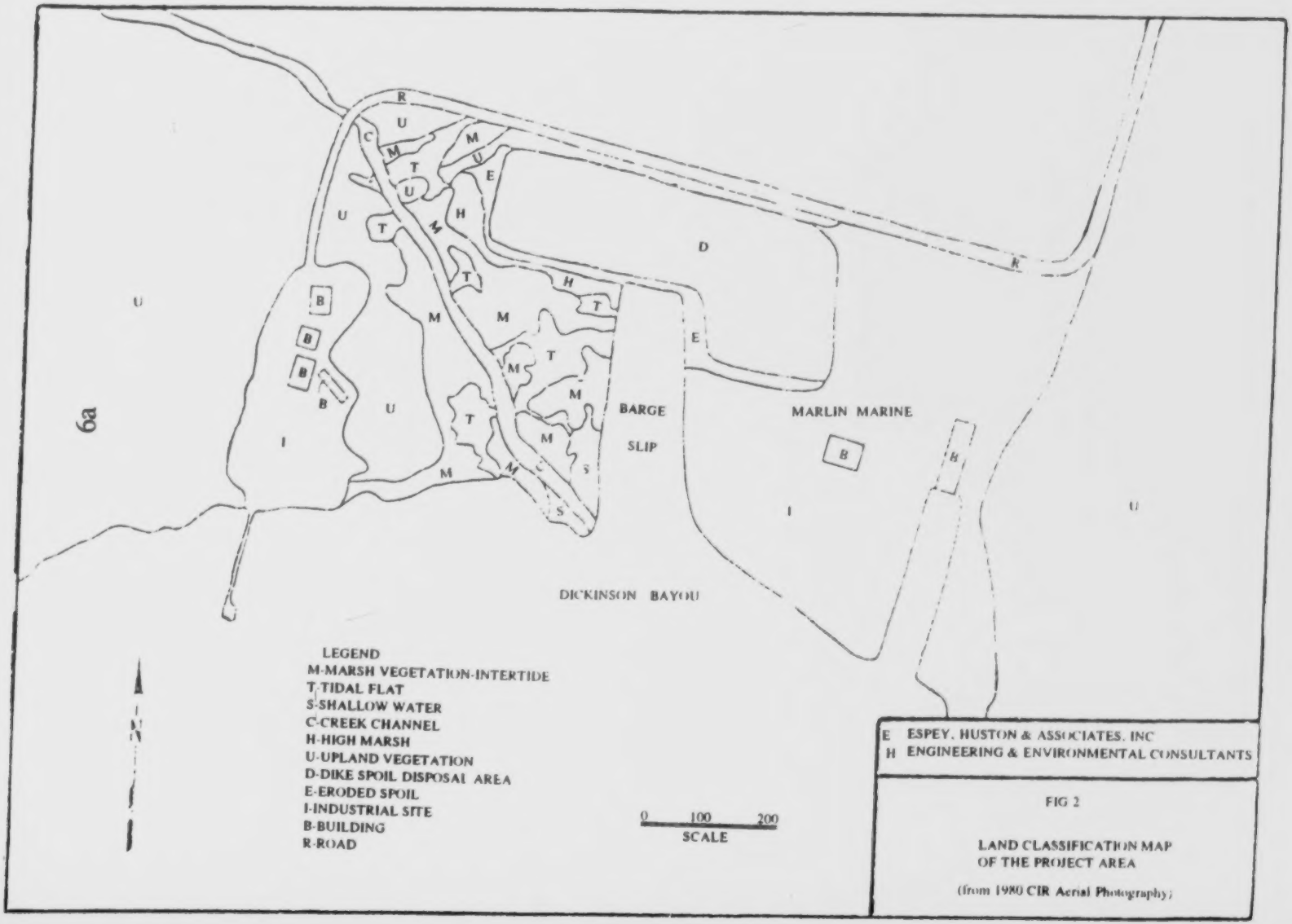
It is further **ORDERED** that Defendant shall procure the Spartina Alterniflora plants from the adjacent wetlands in a manner which will not result in extensive harm to the adjacent wetlands.

It is further **ORDERED** that the fill work and first planting herein ordered shall be completed on or before November 1, 1992.

It is further **ORDERED** that Defendant's failure to comply with this Order in any of its particulars, will subject Defendant to the contempt powers of this Court to the full extent permitted by law.

DONE at Galveston, Texas, this 12th day of May, 1992.

Hugh Gibson
HUGH GIBSON
UNITED STATES DISTRICT JUDGE


6a
BARGE
SLIP
MARLIN MARINE
DICKINSON BAYOU
LEGEND
M-MARSH VEGETATION-INTERTIDE
T-TIDAL FLAT
S-SHALLOW WATER
C-CREEK CHANNEL
H-HIGH MARSH
U-UPLAND VEGETATION
D-DIKE SPOIL DISPOSAL AREA
E-ERODED SPOIL
I-INDUSTRIAL SITE
B-BUILDING
R-ROAD
N
0 100 200
SCALE
E ESPEY, HUSTON & ASSOCIATES, INC
H ENGINEERING & ENVIRONMENTAL CONSULTANTS
FIG 2
LAND CLASSIFICATION MAP
OF THE PROJECT AREA
(from 1980 CIR Aerial Photography)

CLERK U S DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 25 1986
JESSE E. CLARK, CLERK
BY DEPUTY /s/ Mamie Bergan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROY B. ROBINSON	)	
VS.	)	C.A. G-84-35
THE UNITED STATES	)	
OF AMERICA	)	

FINAL JUDGMENT

In accordance with the Court's findings of fact and conclusions of law, it is **ORDERED, ADJUDGED** and **DECREED** that plaintiff violated the Army Corps of Engineers per No. 11/06, and this cause of action is hereby DISMISSED.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas, this the 25th day of March, 1986.

Hugh Gibson
UNITED STATES DISTRICT JUDGE

GOVERNMENT
EXHIBIT
A

CLERK U S DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 25 1986
JESSE E. CLARK, CLERK
BY DEPUTY /s/ Mamie Bergan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON, DIVISION

ROY B. ROBINSON	)	
VS.	)	C.A. G-84-35
THE UNITED STATES	)	
OF AMERICA	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Plaintiff, Roy B. Robinson d/b/a/ Marlin Marine, seeks a declaratory judgment pursuant to 28 U.S.C. §2201 that he has not violated a permit issued by the United States Army Corps of Engineers ("Corps"). The parties tried the case before the Court on 10-11 February 1986. Having considered all evidence and argument presented, the Court now makes the following findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Findings of Fact

1. On 6 December 1976 plaintiff applied to the Corps for a permit to dredge a channel and build a bulkhead at Dickinson Bayou, and the wetlands adjacent to it, in Galveston County, Texas.

2. On 9 March 1977 the Corps issued permit No. 11706 to plaintiff. The permit expired on 31 December 1980. The permit allowed plaintiff to perform "work in or affecting navigable waters of the United States...pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403)" and to "[d]ischarge dredged or fill material into navigable waters...pursuant to Section 404 of the Federal Water Pollution Control Act ['33 U.S.C. §1344]."

3. The permit provides:

1. *General Conditions*

8. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit: and that *any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit* which may result in the modification, suspension or revocation of this permit, in whole or in part...or in the institution of such legal proceedings as the United States Government may consider appropriate ..... (Emphasis added).

4. Specifically, the permit authorized plaintiff to "dredge a barge slip and channel and construct a steel pile bulkhead and backfill." The permit specifies that all activities were to be in accordance with the map and two drawings attached thereto and "incorporated in and made a part of the permit."

5. The first attached drawing, entitled "Amendment to 11706. Location Map," shows the proposed channel, slip, bulkhead, shop and spoil areas. The map also shows a wetlands area adjacent to the shop area and spoil areas. The drawing indicates that no spoil was to be placed in this wetlands area ("no spoil area").

6. Plaintiff dredged in the no spoil area after January, 1976, but before the permit expired.

Conclusions of Law

1. The Court has jurisdiction pursuant to 28 U.S.C. §1331 and 5 U.S.C. §704 because the Court is reviewing the scope of a Corps permit issued pursuant to 33 U.S.C. §§403, 1344.

2. The parties agree and the Court concludes that areas in question are navigable waters and wetlands within the jurisdiction of the Corps.

3. The permit did not authorize plaintiff to dredge in the no spoil area.

4. Plaintiff argues that because the map only indicated that no spoil could be placed on the area, and the words "no dreding" were not added, he did not violate the permit. Plaintiff's argument invites the Court to construe the permit in direct contradiction to permit General Condition 1.a.. which states that all activity that is not specifically authorized is prohibited. The Court declines plaintiff's invitation and holds that the permit means what it says: activity that is not specifically authorized is prohibited.

5. Plaintiff argues estoppel and laches against the Corps' claim of a violation of the permit. Plaintiff contends that before the Corps issued the permit and during the dredging, agents of the Corps saw the dredged no spoil area delineated with stakes and flags. The Corps never attempted to stop the dredging. Plaintiff essentially argues that the Corps' silence it showed that he did not violate the permit

and 2) led him to believe that he had not violated the permit. Plaintiff also argues laches--too much time has passed for the government to argue a violation.

The Corp holds that the silence of the Corps does not estopp it from arguing a violation of express terms of the permit. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Hicks v. Harris*, 606 F .2d 65, 68-9 (5th Cir. 1979); *United States v. Florida*, 482 F .2d 205, 209 (5th Cir. 1973); *Deltona Corp. v. Alexander*, 682 F .2d 888. 891-92 (11th Cir. 1982); *Lavin v. Marsh*, 644 F .2d 1378, 1382-83 (9th Cir. 1981). Furthermore, laches would not prevent the Corps from arguing that plaintiff violated the permit, although it might prevent the Corps from taking punitive action.

6. Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff violated the Army Corps of Engineers permit No. 11706.

7. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constituted findings of fact, they are adopted as such.

DONE at Galveston, Texas, this the 25th day of March, 1986.

/s/ Hugh Gibson
UNITED STATES DISTRICT JUDGE

CLERK, U S DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 4 1985
JESSE E. CLARK, CLERK
BY DEPUTY /s/ Mamie B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROY B. ROBINSON	)	
	)	CONSOLIDATED
VS.	)	
	)	C.A. G-84-35
THE UNITED STATES	)	w/C.A.G-84-325
OF AMERICA, ET AL	)	

ORDER

Before the Court are defendants United States of America and the State of Texas' motions to dismiss or alternatively, motions for summary judgment, and the State of Texas' motion to remand filed in Civil Action G-84-325.

I.

The State of Texas alleges that plaintiff Roy Robinson built and operated his marine salvage facility on Texas Coastal Public Land without authorization from the State. Pursuant to the Texas Coastal Public Lands Management Act, TEX.NAT.RES.CODE ANN. Chapter 33, the State instituted enforcement action against Robinson in the 98th Judicial State District Court in Travis County. On January 23, 1984, Robinson initiated Civil action G-84-35 in this Court, seeking a declaratory judgment against the United

States and the State of Texas. On February 1, 1984, Robinson removed the state proceeding to the federal court in Austin, and the State moved to remand. The federal court in Austin granted Robinson's motion to transfer the State's case to this Court (Civil Action G-84-325), where his declaratory judgment action is pending. By order dated March 7, 1985, this Court consolidated both cases because of similar issues of law and facts.

The State's cause of action against Robinson is predicated upon the TEX.PARK & WILDLIFE CODE, Chapter 86, and the Texas Coastal Public Lands Management Act, a statute designed to protect the natural resources and environmental interests of the State. Any constitutional or federal question issues can only be raised by way of Robinson's defenses in the State enforcement action, and, therefore, do not constitute basis for removal. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983).

The legality of plaintiff's activity under State law is governed by a detailed statutory and regulatory scheme. *See* TEX.NAT.RES.CODE, Chapter 33; 31 TEX.ADM.CODE §§155.1-155.9. The environmental impact of plaintiff's activities upon Texas submerged lands implicates important state interests which meet the criteria for absention. *See Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Comm.*, 685 F .2d 974, 978 (5th Cir. 1982). Adequate opportunity existed for Robinson to raise his federal law defenses in the State proceeding, which was ongoing at the time he attempted removal.

Accordingly, the Court GRANTS the State's motion to dismiss in G-84-35 and REMANDS G-84-325 to the State District Court.

II.

Defendant United States alleges that 1) plaintiff's jurisdictional theory is improper and 2) plaintiff has not exhausted administrative remedies.

Plaintiff has amended his complaint, asserting jurisdiction under the Administrative Procedure Act, 5 U.S.C. §702. Therefore, the United States' first ground for dismissal is MOOT.

The United States contends that although plaintiff initially constructed and dredged his facility under a valid Corps of Engineers permit, he performed additional dredging not authorized by such permit. The United States claims that plaintiff failed to complete an after-the-fact permit application, and, therefore, has not exhausted available administrative remedies to legitimize his unauthorized activity. Plaintiff, on the other hand, maintains that he did not perform unauthorized work, and, hence, did not need an after-the-fact application.

Title 33 C.F.R. §326.3(d), governing unauthorized activity and acceptance of an after-the-fact application, provides that:

> "If the responsible party fails to submit an application...within a reasonable time period, the district engineer *may proceed on his own initiative* with a determination of whether the activity is in the public interest. The determination will be made in accordance

with appropriate procedures..." (Emphasis Added)

Thus, an after-the-fact application is not absolutely necessary before the Corps of Engineers enters a final decision directing remedial work. Accordingly, the Court finds the United States' "exhaustion" argument without merit.

The Court further finds that the only issue in this case is whether plaintiff has violated his federal permit. A resolution of this fact issue will determine whether the Corps' decision is arbitrary or capricious under the Administrative Procedures Act.

In summary, the Court ORDERS as follows:

1. defendant United States' motion for summary judgment is DENIED;

2. defendant State of Texas' motion to dismiss is GRANTED;

3. the State of Texas' motion to remand C.A. G-84-325 is GRANTED;

4. the Court's consolidation order of March 7, 1985 is VOID; and

5. C. A. G-84-325 is REMANDED to the 98th Judicial District Court, Travis County.

DONE at Galveston, Texas, this the 4th day of June, 1985.

Hugh Gibson
UNITED STATES DISTRICT JUDGE

CLERK U S DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
FEB 11 1986
JESSE E. CLARK, CLERK
BY DEPUTY: /s/ Mamie Bergan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROY B. ROBINSON	§	
	§	
V.	§	CIVIL ACTION NO.
	§	G 84-35
THE UNITED STATES	§	
OF AMERICA	§	

JOINT PRETRIAL ORDER

Appearance of Counsel

Plaintiff, Roy B. Robinson, is represented by Richard Parker, 1550 Castle Court, Houston, Texas 77006, telephone (713) 521-0247.

Defendant, The United States of America, is represented by Robert Darden, Assistant United States Attorney, 515 Rusk Avenue, Suite 12000, Houston, Texas 77002, telephone (713) 229-2691.

Statement of the Case

On or about March 8, 1977, Plaintiff Roy B. Robinson was issued U.S. Army Corps of Engineers permit no. 11706 to build a bulkhead as well as dredge a channel at his commercial docking facility at Dickinson Bayou, Galveston County, Texas. This he proceeded to do on about January 1, 1978. His permit allowed him to dredge up to 55,000 cubic years of spoil by hydraulic dredge and dragline for the construction of a docking facility and channel and also to construct a steel sheet pile bulkhead. The dredge material was placed, as per the permit, behind the bulkhead and in a disposal area on high ground.

During the process of dredging, a Corps or Engineers representative visited the site and found some run-off at the disposal site. A cease and desist order was issued to Mr. Robinson. Mr. Robinson, in cooperation with the Corps, cleaned up the run-off to the Crops' stipulation and satisfaction and the cease and desist order was lifted.

In approximately November of 1978 during an on-site inspection, field investigators for the Corps maintained that Mr. Robinson exceeded the scope of his permit authority. After a further investigation in 1979, a recommendation was forwarded from the Permit Enforcement Branch of the Corps of Engineers to the Legal Section that legal action be taken against Mr. Robinson for violating his permit. The legal branch has never referred that recommendation to the Department of Justice for action and the matter has been pending with the Corps' Legal Section in Galveston since 1979. Mr. Robinson has steadfastly denied that he violated his permit in any way.

Mr. Robinson brought this action in early 1984 under the Declaratory Judgment Act seeking a judicial

determination that he has not violated the Corps of Engineers permit no. 11706. The only issue before this Court as per this Court's Order of June 4, 1985, is whether the Plaintiff, Roy B. Robinson, violated the Corps of Engineers' permit no. 11706.

Jurisdiction

This Court has jurisdiction over the subject matter of the parties hereto by virtue of the authority granted it under 28 U.S.C. §1357 and 28 U.S.C. §2201 as well as 33 U.S.C. §403 and §407.

Motions

There are no motions pending at the present time.

Contentions of the Parties

The Plaintiff, Roy B. Robinson, claims that his property rights and business enterprise have been hurt and jeopardized because the Corps of Engineers has made an internal judicial determination that he has violated his permit and thus the Rivers and Harbors Act of 1899, 33 U.S.C. §§304 and 407. This internal determination makes it virtually impossible for Mr. Robinson to get a permit from the Corps of Engineers to maintenance dredge his commercial docking facility and adjacent channel, on which he depends for his livelihood. Also, the internal decision of non-compliance with permit 11706 stays with the property in question, so should Mr. Robinson ever decide to sell, the stigma of non-compliance stays attached to the property for any subsequent purpose. His property value thus diminished and a judicial determination that no violation has taken place is the only way that Mr. Robinson can clear up the matter.

Mr. Robinson contends that the failure of the Corps to either bring a civil action against him or give him an internal clearance leaves him with no option but to seek a judicial determination under the Declaratory Judgment Act that he has not violated permit no. 11706.

The Defendant The United States of America contends that Mr. Robinson violated his permit.

The Defendant The United States of America further contends that it has no duty to resolve issue in any other form as to whether or not Mr. Robinson has violated permit no. 11706.

Admission of Fact

1. Roy B. Robinson was issued Corps of Engineers permit no. 11706 effective March 9, 1977 allowing him to dredge approximately 55,000 cubic yards of material by hydraulic dredge and dragline and construct at steel sheet pile bulkhead at his commercial docking facility on Dickinson Bayou in Galveston County, Texas.

2. Mr. Robinson is the owner of the property the subject of this lawsuit.

Contested Issues of Fact

1. Did Mr. Robinson violate the Corps of Engineers permit no. 11706.

Agreed Applicable Propositions of Law

1. This case is properly brought under the Declaratory Judgment Act.

Contested Issues of Law

1. None

Witnesses

The Plaintiff will call the following witnesses:

1. Roy B. Robinson, Plaintiff, who will testify concerning the facts of permit no. 11706.

2. Mr. Eddie Anderson, who will testify concerning the meetings with the Corps of Engineers and the facts surrounding the issuance of permit no. 11706.

3. Mr. John Wong, (adverse), by deposition, who will testify as to the activities of the Corps of Engineers.

4. Mr. Henry King, (adverse), who will testify as to why the Corps of Engineers has taken no legal action against Plaintiff Roy B. Robinson in the past seven years.

5. Mr. Earl Mills, former Corps of Engineers employee who will testify of the events prior to the issuing of the permit and the initial stages of the investigation.

In addition, the Plaintiff reserves the right to call any or all of the witnesses listed by the Defendant.

The Defendant plans to call the following witnesses:

1. Mr. Fred L. Anthamatten, U.S. Army Corps of Engineers, Galveston, Texas 77553.

2. Mr. Donald Nanninga, U.S. Army Corps of Engineers Galveston, Texas 77553. Mr. Nanninga performed the initial field investigation of the activity.

3. Marcos De La Rosa, U.S. Army Corps of Engineers, Galveston, Texas. Mr. De La Rosa is the Chief, General Regulatory Branch, Galveston District, Corps of Engineers.

4. Fred Miller, U.S. Corps of Engineers, Galveston, Texas, 77553.

5. Earl Mills, former Corps of Engineers employee.

In addition, the Defendant reserves the right to call any or all of the witnesses listed by the Plaintiff.

Settlement

All settlement possibilities have been exhausted and this case will have to be tried.

Length of Trial

It is estimated by the parties that this case will take approximately one and one-half to two days to try.

We hereby respectfully request the entry of this Order.

Respectfully submitted,

/s/ Richard Parker
Richard Parker
1550 Castle Court
Houston, Texas 77006
(713) 521-0247
ATTORNEY FOR PLAINTIFF

/s/ Robert Darden
Robert Darden
Assistant United States Attorney
515 Rusk Avenue, Suite 1200
Houston, Texas 77002
(713)229-2600
ATTORNEY FOR DEFENDANT

This Joint Pre-trial Order is hereby approved and entered this eleventh day of February, 1986.

/s/ H. Gibson
UNITED STATES DISTRICT JUDGE

US COURT OF APPEALS
F I L E D
MAY - 4 1993
RICHARD E. WINDHORST, JR.
CLERK

RECEIVED MAY 10 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7360

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROY B. ROBINSON,
Defendant-Appellant.

Appeal from the United States District Court of the
Southern District of Texas

ON PETITION FOR REHEARING
(May 4, 1993)

Before REYNALDO G. GARZA, WILLIAMS and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED. 5/3/93

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

This case involves 28 U.S.C. §§2201 and 2202, 33 U.S.C. §§ 403, 407, 1311(a), 1319(b), 1344(s)(3), 1344(s)(5) and 33 CFR 323.2. It also involves Rules 12(b), 13(a), 15(b) and 16(e) of the Federal Rules of Civil Procedure. These authorities appear verbatim in the appendix, beginning at App. 25a.

28 U.S.C. §2201. Creation of Remedy

(a) In case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined b the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202. Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

33 U.S.C. § 403. Obstruction of navigable waters generally; wharves; piers, etc.

The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any prot, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 407. Deposit of refuse in navigable water generally

It shall not be lawful the throw, discharge, or deposit, or cause, suffer or procure to be thrown, discharge, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed

into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters, or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. § 1311(a).

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(b)

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be

brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

33 U.S.C. § 1344(s)(3)

(s) Violation of permits

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

33 U.S.C. § 1344(s)(5)

(s) Violation of permits

(5) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

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1. So in original. Probably should be "action".

"33 C.F.R. 323.2 Code of Federal Regulations

(b) The term 'navigable waters of the United States' means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

Rule 12(b), Federal Rules of Civil Procedure

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venus, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive

pleading, the adverse party may assert at the trial any defenses in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 13(a), Federal Rules of Civil Procedure

Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 15 (b), Federal Rules of Civil Procedures

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be

necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Rule 16 (e), Federal Rule of Civil Procedure

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(2)

No. 93-169

Supreme Court, U.S.
FILED
AUG 31 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY B. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

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Galveston, Texas 77553-1229

BEST AVAILABLE COPY

14 pp

QUESTION PRESENTED

Whether the United States is barred from seeking injunctive relief requiring petitioner to restore wetlands he illegally dredged, because the United States did not bring a counterclaim seeking such relief in petitioner's previous, unsuccessful suit seeking a declaratory judgment that he dredged the wetlands legally.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-169

ROY B. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 990 F.2d 1252 (Table). The order of the district court (Pet. App. 3a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1993. A petition for rehearing was denied on May 4, 1993. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on August 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a marine salvage and repair facility in Dickinson Bayou, near Galveston, Texas. On December 6, 1976, he applied to the United States Army Corps of Engineers for a dredge and fill permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. On March 9, 1977, the Corps issued Department of the Army Permit No. 11706 to petitioner authorizing him to dredge a barge slip and channel and construct a steel pile bulkhead and backfill at his facility in Dickinson Bayou. Pet. App. 8a-9a. The permit contained a condition that "any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit." *Id.* at 9a (emphasis omitted).

2. In 1978 and 1979, investigators for the Corps found that petitioner's dredging operations had exceeded his permit authority. Pet. App. 17a. After petitioner's application for an after-the-fact amendment of his original permit was deemed withdrawn for failure to respond to the conservation concerns of federal and state agencies, the Corps ordered petitioner to restore the unauthorized excavation to its pre-project condition. Gov't C.A. Br. 14-15.

3. On February 13, 1980, the State instituted an enforcement action against petitioner in state court, alleging that petitioner had constructed his facility in violation of state law because he had not received state authorization for it. Pet. App. 12a. The State sought, *inter alia*, an injunction requiring petitioner

to restore the wetlands area he had illegally dredged. Gov't C.A. Br. 4.

On January 23, 1984, petitioner filed a suit in district court against the United States and the State, seeking, *inter alia*, a declaratory judgment that he had not violated his permit and asking that the Corps be directed to issue him a permit for maintenance dredging of Dickinson Bayou. Pet. App. 8a, 12a-13a. Petitioner also removed the state action to federal district court, where it was consolidated with petitioner's declaratory judgment action. *Id.* at 13a.

The United States and the State both filed motions under Fed. R. Civ. P. 12(b) to dismiss and/or for summary judgment. Although the State filed an answer, the United States did not. On June 4, 1985, the district court remanded the state action to state court on the ground that the removal was improper and granted the State's motion to dismiss it as defendant in petitioner's declaratory judgment action. Pet. App. 12a-14a. The court held, however, that it had jurisdiction over petitioner's action against the United States and that the action was not precluded for lack of final agency action or failure to exhaust administrative remedies. *Id.* at 14a-15a.

On March 25, 1986, the district court issued findings of fact and conclusions of law holding that Robinson had violated his permit by dredging in a "no spoil" area consisting of navigable waters and wetlands. Pet. App. 10a. The court held that the language of the permit stating that any activity not specifically identified and authorized shall constitute a violation "means what it says." *Ibid.* The court rejected petitioner's argument that the Corps was precluded from enforcing the terms of the permit by reason of estoppel and laches. *Id.* at 10a-11a. The

court thereupon issued a judgment dismissing petitioner's action. *Id.* at 7a.

4. In 1989, petitioner and the State settled the state court action without addressing the restoration issue. When the Corps learned of the settlement, the United States filed this action, seeking to enjoin petitioner from performing any work or depositing any discharge in navigable waters or wetlands without Corps authorization and to require petitioner to restore the wetlands that had been unlawfully dredged. Gov't C.A. Br. 17-18. Petitioner advanced a number of defenses, including the claim that Fed. R. Civ. P. 13(a) and principles of res judicata barred the government's claim because of the government's failure to file a counterclaim for injunctive relief in petitioner's earlier declaratory judgment action. The district court rejected petitioner's defenses and issued an injunction requiring petitioner to restore the wetlands area at issue and to take related remedial steps. The court's order warned petitioner that his failure to comply with any of the order's particulars would subject him to contempt. Pet. App. 3a-5a.

5. The court of appeals affirmed in an unpublished order. Pet. App. 1a-2a.

ARGUMENT

Petitioner renews his claim that Fed. R. Civ. P. 13(a) and principles of res judicata preclude the United States from obtaining the injunction it seeks.

1. Fed. R. Civ. P. 13(a) has no application to this case. In petitioner's 1984 action, the government moved pursuant to Fed. R. Civ. P. 12(b) to dismiss for failure to state a claim and on other grounds; the government did not file an answer, nor was it

compelled to. Rule 13(a) provides that a counterclaim must be filed "at the time of serving the pleading."[1] Since the United States served no answer—and thus no "pleading"—on respondent in this case, no occasion for application of Rule 13(a) arose. See, *e.g.*, *Horn & Hardart Co.* v. *National Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir.), cert. denied, 488 U.S. 849 (1988);[2] *United States* v. *Snider*, 779 F.2d 1151 (6th Cir. 1985); *Lawhorn* v. *Atlantic Refining Co.*, 299 F.2d 353, 356 (5th Cir. 1962).

Petitioner contends (Pet. 10) that the pretrial order entered in this case pursuant to Fed. R. Civ. P. 16(e) is a "pleading," and that it thus triggered the government's alleged obligation to file a counterclaim. Fed. R. Civ. P. 7(a) (entitled "Pleadings Allowed; Form of Motions") enumerates the pleadings that are

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[1] Rule 13(a) provides in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

[2] Petitioner concedes (Pet. 4) that "[t]here is no conflict between the *decisions* of different circuits" on the issues in this case. He does claim that there is what he terms (*ibid.*) "a conflict in *princip[le]*" between the Fifth Circuit's decision in this case and the district court's decision in *Horn & Hardart Co.* v. *National R.R. Passenger Corp.*, 659 F. Supp. 1258 (D.D.C. 1987), aff'd, 843 F.2d 546 (D.C. Cir.), cert. denied, 488 U.S. 849 (1988). We doubt that there is any such "conflict in principle." Even if there were, however, further review would not be warranted to resolve an apparent disagreement between the decision of the Fifth Circuit in this case and some comments in an opinion of a district court on an issue that was later addressed definitively by the court of appeals when the district court's opinion was appealed.

allowed in a civil action. It does not include a pretrial order among the pleadings that are allowed, and it expressly provides that, aside from the enumerated pleadings, "[n]o other pleading shall be allowed." Accordingly, the pretrial order was not a "pleading" and did not trigger any alleged obligation of the government to file a counterclaim.

Petitioner cites *Syrie* v. *Knoll Int'l*, 748 F.2d 304, 308 (5th Cir. 1984), and *In-Sink-Erator Mfg. Co.* v. *Waste King Corp.*, 346 F.2d 248, 251 (7th Cir.), cert. denied, 382 U.S. 835 (1965), for the proposition that a pretrial order is a pleading. Pet. 10. In *Knoll*, however, the court merely held that the terms of a pretrial order may amend a pleading previously filed, a result that is plainly contemplated by Rule 16(e)'s provision that a pretrial order "shall control the subsequent course of the action." 748 F.2d at 308. The court did not hold that a pretrial order is itself a pleading and did not have occasion to address any question concerning the application of Rule 13(a). Similarly, in *In-Sink-Erator*, the defendant filed responsive pleadings, including a counterclaim, under Rule 7(a), see 346 F.2d at 249, and the issue before the court concerned the effect of the pretrial order on those pleadings. The court noted that the parties conceded that "a pretrial conference order constitutes a pleading *insofar as it establishes, enlarges, or limits the issues of fact or of law in the case.*" *Id.* at 251 (emphasis added). That appears to be equivalent to the holding in *Knoll* and, as in *Knoll*, does not address the question whether a pretrial order constitutes a pleading for purposes of Rule 13(a).

2. In any event, Rule 13(a) does not by itself provide for the consequences of a failure by a defendant to interpose a compulsory counterclaim.

Petitioner therefore relies on principles of claim preclusion, or res judicata, to argue that the alleged failure of the United States to seek injunctive relief against petitioner in petitioner's prior declaratory judgment action precludes the claim asserted by the United States in this case.

Principles of claim preclusion, however, do not apply with full force to declaratory judgment actions. As petitioner acknowledges (Pet. 7-8), the Declaratory Judgment Act itself suggests that result, since it provides that "[f]urther necessary or proper relief based on a declaratory judgment * * * may be granted * * * against any adverse party whose rights have been determined by such judgment." 28 U.S.C. 2202. The Restatement of Judgments agrees with that principle. The Restatement rule is that a final judgment in a declaratory judgment action "is conclusive in a subsequent action * * * *as to the matters declared*, and, in accordance with the rules of issue preclusion, as to any issues actually litigated * * * and determined in the action." Restatement (Second) of Judgments § 33 (1982) (emphasis added). The comment to that section explains that "a declaratory action * * * does not have a claim preclusive effect * * * with respect to a counterclaim by a defendant." *Id.* § 33 comment c, at 336. That is because, if declaratory judgments had preclusive effect on counterclaims not actually litigated, "[a]ctions for declaratory relief would rapidly develop into full-scale legal contests, and the option of a preliminary suit limited to a declaration of the rights of the parties would evaporate." *Harborside Refrigerated Services, Inc.* v. *Vogel*, 959 F.2d 368, 373 (2d Cir. 1992); accord *Empire Fire & Marine Ins. Co.* v. *J. Transport, Inc.*, 880 F.2d 1291, 1294-1299 (11th Cir. 1989); *Horn &*

Hardart Co. v. *National Rail Passenger Corp.*, 843 F.2d at 549.

Petitioner contends that the Restatement rule does not apply to this case because in his prior action he sought not only a declaration that his dredging comported with his permit, but also an injunction that the Corps issue him a maintenance dredging permit. That request for an injunction, however, did not change the character of petitioner's suit, since petitioner's injunctive claim was entirely dependant on his claim that he was not in violation of his permit; once the district court determined that he was in violation of the permit and that he was therefore not entitled to the declaration he sought, no further issue was presented by his request for a maintenance permit.

To treat petitioner's claim for a maintenance permit as transforming the res judicata effect of his prior action would permit a party in petitioner's position—a potential defendant in an enforcement action—to dictate how the government exercises its enforcement discretion. Cf. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *City of Seabrook* v. *Costle*, 659 F.2d 1371, 1374-1375 (5th Cir. 1981); *Harmon Cove Condominium Ass'n* v. *Marsh*, 815 F.2d 949, 951-953 (3d Cir. 1987) (holding that the United States has prosecutorial discretion under the 1899 Rivers and Harbors Appropriation Act).[3] Any such party could

[3] It is established that persons fearing a future enforcement action may not bring actions under the limited waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. 702, to preempt a feared enforcement action, because until the agency actually institutes an enforcement proceeding, there is no final agency action for the court to review. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238, 241-244 (1980).

simply bring a declaratory judgment action against the government and include a claim for relief that would be appropriate only if that party obtains the requested declaration. Under those circumstances, if petitioner's theory were correct, the government would lose any opportunity to exercise its enforcement discretion; by failing to file its enforcement action as a counterclaim, the government would permanently lose its ability to enforce the legal obligation at issue.

3. Finally, principles of res judicata also do not bar a claim where "it is the sense of the scheme that the [defendant] should be permitted to split his [counter]-claim." Restatement (Second) of Judgments, *supra*, § 26(d). In light of the constitutional interests underlying the right of the Executive Branch to determine the necessity for and timing of enforcement actions, see, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. at 832, it is plainly "the sense of the scheme" that a plaintiff's decision to institute a declaratory judgment action does not bar a later government enforcement action. Compare Restatement (Second) of Judgments, *supra*, § 26(f) (no bar where "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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